No._____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 2002

CASEY J. TOLAR, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the Seventh Circuit erred by deciding that law enforcement personnel did not need either a warrant or the presence of a valid exception to the warrant requirement of the Fourth Amendment when they entered protected business premises *en masse* and with a show of force?

LIST OF PARTIES

The parties to the proceeding below were the Petitioner, Casey J. Tolar, Jr., and the Respondent, the United States of America.

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In The

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OCTOBER TERM, 2002

CASEY J. TOLAR, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

The Petitioner, Casey J. Tolar, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled proceeding on October 9, 2001.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is published at 268 F.3d 530 (7th Cir. 2001) and is reprinted in the appendix at page A-1. The opinion of the district court addressing the questions presented by petitioner Tolar is reprinted in the appendix at page A-4.

JURISDICTION

The Seventh Circuit affirmed Petitioner Tolar's conviction and sentence on October 9, 2001. This Court

has jurisdiction to review the Seventh Circuit's decision under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

I. FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Tolar was convicted of possessing, with intent to deliver, 477 kilograms of cocaine and 2,350 kilograms of marijuana. The drugs were contained in propane tanks that Tolar, a truck driver and the proprietor of C&I Specialized, a transportation business, had hauled from Edinburg, Texas to the C&I Specialized premises in Harvey, Illinois. The drugs were seized after law enforcement agents, acting on a tip, entered the C&I Specialized premises on November 11, 1999 and obtained Tolar's signature on a consent form allowing a search of his truck. Tolar was subsequently arrested and transported to the Oak Forest, Illinois police station. At trial, the government presented witnesses who testified that Tolar made oral and written statements at the Oak Forest Police Station in which Tolar admitted, *inter alia*, that he knew that narcotics were present in the propane tanks. Tolar testified that he was unaware that there were narcotics in the tanks, that he made no statements to the contrary while in police custody and that his signature on the written statement offered by the government had been coerced. Prior to trial, Tolar moved to suppress and exclude from evidence both the narcotics

contained in the propane tanks and any evidence concerning statements that he allegedly made while in police custody. One of the principal arguments raised by Tolar in support of suppression was that law enforcement personnel had violated the Fourth Amendment by entering his business premises and the curtilage of the buildings thereon without either a warrant or the presence of any exception to the warrant requirement.

The district court denied Tolar's suppression motions and the Seventh Circuit affirmed the district court's decision. As set forth more fully below, Tolar maintains that the decisions of the district court and the Seventh Circuit run afoul of — and substantially eviscerate — substantial protections afforded by the Fourth Amendment and therefore should be reversed by this Court.

I. C&I SPECIALIZED PREMISES

On November 11, 1999, C&I Specialized occupied premises at 15212 Dixie Highway in Harvey, Illinois, which it had leased for approximately two years. (Hr. at 255)[1] The premises were approximately 180 feet by 280 feet and were entirely surrounded by a six foot chain link fence topped by three strands of barbed wire. (Hr. at 256; Tr. at 338; SGX 10) The premises contained two buildings: a "block building" used as a "shop" and an adjacent "office trailer." (Hr. at 256; SGX 10) There was a

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[1] "Hr __" is a citation to the transcript of the suppression hearing in this matter. "Tr. __" is a citation to the transcript of the trial in this matter. "Sr. __" is a citation to the transcript of the sentencing hearing in this matter. "SGX __" and "SDX __" are citations to government and defense exhibits at the suppression hearing in this matter. "Sr. __" is a citation to the transcript of the sentencing hearing in this matter. Citations to the record are denoted "R. __."

double gate in the chain link fence, which was typically closed and locked. (Hr. at 256-57; SDX 4) "Normally, the only time that [the] gate [was] open [was] when [Tolar] [was] physically there and ... walking around in the yard." (Hr. at 257) There was a sign attached to the right side of the gate stating:

UNAUTHORIZED VEHICLES
WILL BE TOWED AWAY
FEE 105
15332 DIXIE HWY HARVEY
708-333-6780
24 HR. 999 71999 999-9122

(Hr. at 257-58; SDX 4) Tolar testified that the sign "warns anyone who parks in front of [the] gate ... that their vehicle will be towed at the owner's expense." (Hr. at 258)

Between two doors, the block building had a drawing of a guard dog surrounded by the words "Attack Dog On Duty," beneath which appeared the words "Open" and "Mon. thru Fri. 8 am to 6 pm" and "Sat 9 am to 1 pm" and "CLOSED SUN." (Tr. at 258; SGX 12) Neither Tolar nor any representative of C&I Specialized placed this language on the block building, and to the best of Tolar's knowledge, the writing and the drawing of the dog came from individuals who occupied the property before C&I Specialized. (Tr. 259) Indeed, no one ever told Tolar that he or she took the "office hours" set forth on the block building to be C&I Specialized's hours of operation or understood the writing on the block building to mean that C&I Specialized was open. (Tr. at 259-60) A review of photographs of the block building reveals that the "hours of operation" language thereon is at best difficult to read from outside the C&I Specialized premises with the naked eye. (SDX4; SGX10) Indeed, one law enforcement officer testified that he read this language from a position outside

the C&I Specialized premises using binoculars and that he was "not sure" whether this language could be read from outside the premises without binoculars. (Hr. at 84)

The C&I Specialized premises in Harvey were never open to the public and were not open to the public on November 11, 1999. (Tr. at 257) No customer ever walked in to the C&I Specialized premises without having called or made arrangements in advance. (Tr. at 257) Indeed, C&I Specialized never advertised to the public. (Tr. at 260) Nor did C&I Specialized ever put a sign on the fence surrounding its premises announcing either its business name or hours. (Hr. at 83; Tr. at 260, 340)

II. THE ENTRY OF LAW ENFORCEMENT PERSONNEL ON TO THE C&I SPECIALIZED PREMISES

On November 11, 1999, law enforcement personnel were surveilling the premises of C&I Specialized in Harvey because on or about November 10 they "had received information that there might be illegal narcotics inside the propane cylinders" on Tolar's truck. (Tr. at 20; R. 1, Complaint, Affidavit of Raymond Smith, ¶ 10) Special Agents Dwayne Killian and Anthony Policandriotes were watching C&I Specialized from an unmarked police car in the parking lot of a Commonwealth Edison facility across the street from C&I Specialized. (Tr. at 20) They had begun their surveillance at 7:00 a.m. on the morning of November 11, when they had relieved other law enforcement personnel that had been conducting surveillance the night before. (Tr. at 21) When Agents Killian and Policandriotes arrived to begin their surveillance, the gates of C&I Specialized were closed. (Tr. at 21) Subsequently, the gates were opened and Agents Killian and Policandriotes observed people enter

and depart the premises of C&I Specialized in various vehicles. (Hr. at 57; Tr. at 21)

At approximately 10:00 a.m., Agents Killian and Policandriotes observed Tolar and Johnny Moore, an associate of Tolar's who had arrived at the C&I Specialized lot that morning looking for a load of freight, use a forklift to remove one of the propane tanks from the rear of the truck and place it on the ground. (Hr. at 7, 14, 19; Tr. at 24) Killian did not see any illegal activity on the C&I Specialized premises concerning the trailer or the removal of the propane tank or anyone with a firearm. (Hr. at 87) Killian "contacted [his] supervisor" and "informed him that ... it appeared that they were unloading the truck, they had taken one cylinder off and placed it on the ground." (Tr. at 24) Killian and his supervisor "came to the conclusion that [they] were going to enter the business and attempt to locate the owner." (Tr. at 25) Previously the agents' plan had been to try to stop Tolar's truck on the highway and then seek consent to search the truck, but now they decided to enter the lot, confront Tolar and ask for permission to search his truck. (Hr. at 85, 127) Agents Killian and Policandriotes did not attempt to obtain a search warrant. (Hr. at 127-28) Neither Agent Killian nor Agent Policandriotes nor any other law enforcement personnel asked for or obtained consent from any representative of C&I Specialized to enter the premises. (Hr. at 88, 134, 266-67)

Agents Killian and Policandriotes then donned bullet proof vests and "proceeded across Dixie Highway and entered" the premises of C&I Specialized, which agent Killian described as a "parking lot." (Tr. at 25) All told, three law enforcement vehicles entered the C&I Specialized premises at this time. (Hr. at 24) Agent Killian exited his vehicle and approached Johnny Moore.

(Hr. at 60-61) Agent Killian drew his gun as he did so. (Hr. at 60-61) Agent Policandriotes approached Tolar. (Hr. at 120-21) Agent Policandriotes testified that he did not draw his gun as he approached Tolar (Hr. at 120, 124), but both Moore and Tolar testified that Policandriotes indeed drew his gun. (Hr. at 25-26, 28, 37, 265-68) Tolar and Moore were both patted down for weapons. (Hr. at 61, 122) Tolar thereafter signed a consent form allowing a search of his truck. (Hr. at 63-67, 276-78; SGX 1) The search unearthed narcotics in the propane tanks on the truck and Tolar was later taken into custody. (Tr. at 32, 45-59)

III. THE SUPPRESSION HEARING

Tolar was charged in a one-count Indictment with possession of cocaine and marijuana with intent to distribute in violation of 21 U.S.C. §841(a)(1). (R. 9, Indictment) On May 23, 2000, Tolar filed, *inter alia*, motions to suppress statements, suppress illegally obtained evidence and quash arrest. (R. 23, Motion To Quash Arrest And To Suppress Evidence; R. 25, Motion To Suppress Statements; and R. 26, Motion To Suppress Illegally Obtained Evidence). A principal argument raised by Tolar in these motions was that law enforcement personnel had violated the Fourth Amendment by entering the C&I Specialized premises without a warrant. (*Id*)

On August 21 and 22, the district court held an evidentiary hearing on Tolar's suppression motions. On September 5, 2000, the district court denied Tolar's motions and held, *inter alia*, that law enforcement was not required to obtain a warrant to enter the C&I Specialized premises and that in any event law enforcement's entry on to the premises was justified by exigent circumstances and Tolar's subsequent consent:

In his various motions to suppress, Mr. Tolar and his counsel raise other matters in support thereof. The first of them is that the entry by law enforcement personnel on to the C&I property was itself an illegal search. As the Supreme Court has declared, "what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz v. United States*, 389 U.S. 347, 351 (1967). There is simply no expectation of privacy in an exposed business parking lot. The gate to the business parking lot was open at the time of the officers' entry on to the premises, and there was no indication that permission was required to enter. Additionally, the Supreme Court has recognized that a business, by its nature, may open itself to intrusions that would not be permissible in a purely private context. *United States v. Swart*, 679 F.2d 698, 701 (7th Cir. 1982) (citing *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 353 (1977).

Law enforcement officers had information drugs were on the tractor/trailer which was situated on the C&I lot. They observed one of the tanks being removed from the trailer. Not knowing what would happen next and not wanting to risk the disappearance of objects believed to contain drugs, exigent circumstances existed sufficient to warrant entry onto the lot to further investigate the circumstances. The combination of prior information and present observation combined to supply them with a reasonable and articulable basis to investigate further and to enter the property. The defendant's lawful consent to search his truck, the trailer and attached tractor,

> also validated their presence on the scene. Under these circumstances, no judicially authorized search warrant was required and no attempt to secure one was necessary.

(R. 47, September 5, 2000 Findings Of Fact And Conclusions Of Law, pp. 10-11; App., Tab B at A11-12) The district court also found, among other things, that "[t]he evidence overwhelmingly establishes that the consent to search was knowingly and voluntarily given" and that "[i]t is equally clear that Mr. Tolar was given his constitutional rights on a number of occasions and that he knowingly, voluntarily and freely waived those rights. No other conclusions are reasonably possible." (R. 47, September 5, 2000 Findings Of Fact And Conclusions Of Law, p. 10; App., Tab B at A11)

IV. TRIAL AND SENTENCING

Trial commenced on November 6, 2000. (Tr. at 1, 2) The jury returned a verdict of guilty on November 9, 2000. (R. 75, Minute Order Entering Judgment On Guilty Verdict) On February 8, 2001, the district court sentenced Tolar to a term of life imprisonment. (R. 86, Judgment And Sentencing Order; App., Tab D at A43-48)

V. THE DECISION OF THE SEVENTH CIRCUIT

Tolar appealed both his conviction and his sentence. Tolar's central argument was that the warrantless entry of law enforcement personnel on to the C&I Specialized premises violated the Fourth Amendment and, therefore, Tolar's consent to search and any subsequently obtained evidence (including his alleged statements) should have been suppressed.

On October 9, 2001, the United States Court of Appeals for the Seventh Circuit affirmed Tolar's conviction

and sentence. A-1. The Seventh Circuit rejected Tolar's principal argument that the warrantless entry of law enforcement personnel on to the C&I Specialized premises had been illegal. Appendix at A-2, 3. The Seventh Circuit concluded that the entry was neither a search nor a seizure and therefore did not violate the Fourth Amendment, even if Tolar had a reasonable expectation of privacy in the C&I Specialized premises and even if law enforcement personnel committed a civil trespass by entering the premises without his permission:

> Only a rule equating trespass with a violation of the Constitution could support Tolar's position. Yet a trespass is neither necessary nor sufficient for constitutional purposes.
>
> * * * * *
>
> Businesses such as C&I's lot that can be observed by anyone passing on the street lack any comparable privacy interest. An open gate invites entry, and a chain-link fence does little to assert a privacy interest (as opposed to a property interest) in details visible from outside the fence. Agents would have needed cause, and perhaps a warrant or equivalent order, to enter in order to open containers, take soil samples, or otherwise investigate aspects of the lot that the public could not observe from outside. Compare *New York v. Burger*, 482 U.S. 691 (1987), with *United States v. Tarkowski*, 248 F.3d 596 (7th Cir. 2001). But they did none of these things – did not conduct any form of search – and so did not violate the fourth amendment by entering the lot in order to find the owner and ask his permission to do more.

268 F.3d at 532; Appendix at A-2.

REASONS FOR GRANTING THE WRIT

I. AN *EN MASSE* ENTRY OF ARMED OFFICERS ON TO PRIVATE PROPERTY VIOLATES THE FOURTH AMENDMENT IN THE ABSENCE OF A WARRANT OR APPROPRIATE EXCEPTION

The Seventh Circuit erred in deciding that the entry of law enforcement personnel on to the C&I Specialized premises was a mere civil trespass that does not implicate the Fourth Amendment, requiring neither a warrant nor the presence of an appropriate exception. In fact, it is undisputed that law enforcement personnel entered the C&I Specialized premises in large numbers (three vehicles) and with a display of force (bullet proof vests and at least one drawn pistol). Such an *en masse*, armed entry constitutes, by itself, a seizure in violation of the Fourth Amendment. This Court should grant *certiorari* and reverse the decision of the Seventh Circuit to prevent the erosion of Fourth Amendment rights contained within the decision. As explained more fully below, the decision will — if allowed to stand — eviscerate a substantial part of the protections afforded by the Fourth Amendment.

First, it is beyond dispute that the C&I Specialized premises were protected by the Fourth Amendment. As a general matter, it is well established that the Fourth Amendment protects business premises such as those of C&I Specialized from unreasonable searches and seizures. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 311-13 (1978); *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 353 (1977); *See v. City of Seattle*, 387 U.S. 541, 545 (1967). The Fourth Amendment applies to premises in which a person can claim a reasonable expectation of privacy.

Smith v. Maryland, 442 U.S. 735, 740 (1979). The existence of a reasonable expectation of privacy turns upon whether a person has exhibited a subjective expectation of privacy in the premises and whether that expectation is objectively justifiable. *Smith*, 442 U.S. at 740. Tolar clearly manifested a subjective expectation of privacy in the C&I Specialized premises that was objectively justifiable. The premises were enclosed by a six foot chain link fence topped with three strands of barbed wire. (Hr. at 256; Tr. at 338; SGX 10) The gate was typically locked. (Hr. at 256-57; Tr. at 12-14; SDX 4) The sign on the gate indisputably stated "unauthorized vehicles will be towed away." (SDX 4) There was no sign on the fence setting forth C&I Specialized's name or hours of operation. (Hr. at 83; Tr. at 260, 340) C&I Specialized did not advertise to the public. (Tr. at 260) No customer had ever entered the premise without having called or made arrangements in advance. (Tr. at 257) The premises had never been open to the public. (Tr. at 257) In addition, even if the entire C&I Specialized premises was not protected by the Fourth Amendment, the curtilage of the buildings on the premises — the area where Tolar and Moore were first confronted by the *en masse* entry of law enforcement — was protected. *See United States v. Swart*, 679 F.2d 698 (7th Cir. 1982). In sum, the area where Tolar and Moore were confronted by the *en masse* entry of law enforcement personnel was protected by the Fourth Amendment both because it was on the C&I Specialized premises and it was within the curtilage of the buildings thereon.

Second, the Seventh Circuit characterized the entry of law enforcement officers on to the C&I Specialized premises as a mere "entering [of] the lot in order to find the owner and ask his permission" to search (268 F.3d at 532, Appendix at A-2) and concluded that the entry did not implicate the Fourth Amendment and, at most, constituted a

mere civil trespass. The Seventh Circuit erred in this decision. It is well established that a person may open himself up to certain types of intrusions while maintaining an objectively reasonable expectation that he will not be subjected to other types of intrusions. *See Bond v. United* States, 529 U.S. 334 (2000) (bus passenger who placed bag in compartment above his seat expected that the bag "may be handled" but had a reasonable expectation that no one would "feel the bag in an exploratory manner"); *Katz v. United States*, 389 U.S. 347 (1967) (man in phone booth constructed partially of glass was open to visual observation but had reasonable expectation that his conversation would not be overheard). Here, even assuming the premises of C&I Specialized were open to entry by a lone officer who displayed no force but simply sought to speak to Tolar (and Tolar submits that the record evidence established that the premises were not open even to this intrusion), Tolar had a legitimate, objective expectation that neither he nor his property would be subjected to the en masse entry with a display of force that occurred here.

That en masse entry and the accompanying display of force constituted a seizure and is precisely the type of government intrusion that the Fourth Amendment was intended to prohibit in the absence of a warrant or an appropriate exception. As this Court observed in *United States v. Mendenhall*, 446 U.S. 544 (1980), the activities of law enforcement in this case — a large number of officers, a display of weapons — is precisely the type of conduct that implicates the Fourth Amendment:

> Examples of circumstances that might indicate a seizure . . . would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person or

> the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.

Mendenhall, 446 U.S. at 554. In this case, the entry of a large number of law enforcement personnel on to the C&I Specialized premises constituted a seizure of the entire premises and all persons thereon. From the moment a large number of officers entered the C&I Specialized premises with a display of force, law enforcement personnel seized control of the premises in their entirety and all individuals thereon. The facts admit of no other conclusion.

In sum, the Seventh Circuit was incorrect when it held that "[o]nly a rule equating trespass with a violation of the Constitution could support Tolar's position." (268 F.3d at 532, Appendix at A-2) In fact, only a rule equating an en masse entry of law enforcement agents and a display of force with a mere civil trespass could justify the Seventh Circuit's decision. Such a rule would ignore reality and, as discussed below, substantially erode the protections afforded by the Fourth Amendment.

Third, if allowed to stand, the Seventh Circuit's decision would substantially erode the protections afforded by the Fourth Amendment:

> "The makers of our Constitution . . . sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be left alone — the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must

> be deemed a violation of the Fourth Amendment."

Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). Under the Seventh Circuit's decision, law enforcement personnel can enter private property in large numbers and with a display of force without obtaining a warrant from a detached magistrate or establishing the existence of an exception to the warrant requirement. Under the Seventh Circuit's reasoning, such an entry constitutes a mere civil trespass and does not implicate constitutional rights.

Tolar respectfully suggest that this is not, and cannot be, the law. All private property, no matter how carefully protected by the owner, would be subject to intrusion by large numbers of government agents ostensibly seeking the owner merely to ask his permission to search. Such intrusions are precisely the type of government conduct that the Fourth Amendment was intended to prohibit absent a warrant or certain very limited exceptions.

CONCLUSION

For the reasons set forth above, petitioner Casey J. Tolar respectfully requests that this Court grant certiorari, reverse the decision of the United States Court of Appeals for the Seventh Circuit and order this case remanded to the district court for a new trial.

Dated: January 7, 2002.

Respectfully submitted,

PETITIONER CASEY J. TOLAR

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 01-1375

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CASEY J. TOLAR, JR.,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 99 CR 940—**Charles P. Kocoras**, *Judge.*

ARGUED SEPTEMBER 19, 2001—DECIDED OCTOBER 9, 2001

Before EASTERBROOK, DIANE P. WOOD, and WILLIAMS, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* C&I Specialized, Inc., an apparently legitimate business, was a front for a drug-running operation. Acting on a tip, agents entered C&I's business premises in Harvey, Illinois, at 10 a.m. on a Thursday morning and asked Casey Tolar, C&I's owner, for permission to examine the cargo of a truck that had recently arrived. Tolar signed a consent form. During the ensuing search the agents found 477 kilograms of cocaine and 2,350 kilograms of marijuana hidden inside a few of the large propane tanks in the truck's cargo. Tolar has been

sentenced to life imprisonment for this large-scale drug operation.

Given the outcome of the search, Tolar's best chance lay in asking the district court to suppress the evidence. He offered two principal theories: first, that his consent was the fruit of an unlawful entry by the agents; second, that the consent was in any event involuntary. After a hearing, the district court rejected both theories and denied the motion to suppress. Tolar renews both contentions on appeal, leading with the argument that, because C&I's business premises were enclosed by a chain-link fence (topped by barbed wire) and a sign warned illegal parkers that their cars would be towed, the agents were not entitled to enter even though another sign stated that the business was open Monday through Friday from 8 a.m. to 6 p.m., and the gate to the lot was open.

Tolar's argument starts with the major premise that the fourth amendment forbids all trespasses, adds the minor premise that the entry was a trespass despite the open gate and the open-for-business sign (that sign was the doing of a prior owner, Tolar insists, and did not reflect his practices), and concludes that the unauthorized entry therefore was unlawful. Then Tolar treats the consent as the "fruit of the poisonous tree" and argues that the evidence seized on its authority must be suppressed. The "fruits" argument is a doubtful one. The statements of a person held in unlawful custody may be tainted, see *Brown v. Illinois*, 422 U.S. 590 (1975), but Tolar was not detained until after the drugs were found, and the police did not induce the consent by confronting Tolar with any evidence improperly seized. During their time inside the fence (and before the consent) they saw nothing that they had not already seen from outside the fence. The view from outside, which revealed that Tolar and a companion were starting to unload the

cylinders from the truck, did not invade any of Tolar's privacy interests, and hence could not have violated the fourth amendment. See *Boyd v. United States*, 116 U.S. 616, 628 (1886). Arguments about causation may be put to one side, however, because the agents' entry did not violate the fourth amendment in the first place.

Only a rule equating trespass with a violation of the Constitution could support Tolar's position. Yet a trespass is neither necessary nor sufficient for constitutional purposes. Wiretaps do not entail trespasses, but they may invade privacy and are treated as searches; other investigative steps, which do involve trespass, pose no risk of invading privacy and hence are not deemed searches or seizures. See *Rakas v. Illinois*, 439 U.S. 128, 143 (1978) (remarking that the fourth amendment has been decoupled from the law of trespass). To take one example close to the mark, the Supreme Court has held that agents did not violate the fourth amendment when they entered a private parking lot to seize a car. *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 351-55 (1977). See also *United States v. Swart*, 679 F.2d 698, 701 (7th Cir. 1982). Likewise courts do not exclude evidence just because police reach a suspect's door by cutting across the yard (trampling on the rhododendrons in the process) rather than using the pathway, or because they enter a home's curtilage to seize garbage in which there is no privacy interest. See *United States v. Redmon*, 138 F.3d 1109 (7th Cir. 1998) (en banc); *United States v. Dunkel*, 900 F.2d 105 (7th Cir. 1990), remanded on other grounds, 498 U.S. 1043 (1991), decision on remand, 927 F.2d 955 (7th Cir. 1991). Crossing the threshold of a home would be a different matter, in light of the special status dwellings enjoy under the Constitution. See *Kyllo v. United States*, 121 S. Ct. 2038 (2001); *Sparing v. Olympia Fields*, No. 00-1021 (7th Cir. Sept. 19, 2001), slip op. 6-11. Businesses such as

C&I's lot that can be observed by anyone passing on the street lack any comparable privacy interest. An open gate invites entry, and a chain-link fence does little to assert a privacy interest (as opposed to a property interest) in details visible from outside the fence. Agents would have needed cause, and perhaps a warrant or equivalent order, to enter in order to open containers, take soil samples, or otherwise investigate aspects of the lot that the public could not observe from outside. Compare *New York v. Burger*, 482 U.S. 691 (1987), with *United States v. Tarkowski*, 248 F.3d 596 (7th Cir. 2001). But they did none of these things—did not conduct any form of search—and so did not violate the fourth amendment by entering the lot in order to find the owner and ask his permission to do more.

As for the search: The district court found that Tolar's consent and subsequent inculpatory statements were voluntary. Both the agents and Tolar's companion testified that the agents entered peaceably and behaved amicably. Tolar represented on the consent form that no threats had been made. He testified otherwise, but the district judge did not commit a clear error in believing the agents, Tolar's companion, and the statements Tolar himself made when giving consent. See *Anderson v. Bessemer City*, 470 U.S. 564, 570 (1985). Given the court's findings of fact, the consent is unexceptionable. See *Ohio v. Robinette*, 519 U.S. 33 (1996); *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

Only one decision affecting the sentence has been contested. The district court concluded that Tolar's ability to drive an 18-wheel rig was a special skill "that significantly facilitated the commission or concealment of the offense" and earned a two-level increase under U.S.S.G. §3B1.3. Tolar recognizes that *United States v. Lewis*, 41 F.3d 1209, 1214 (7th Cir. 1994), deems the

ability of an over-the-road truck driver a special skill that can lead to an enhancement, but he insists that this skill did not facilitate his particular offense. The district judge was entitled to (and did) find otherwise. Tolar's skill enabled him to use C&I as a front for transporting large quantities of drugs. He was harder to catch than the normal drug courier and able to move more per trip. On both accounts an enhancement was proper.

AFFIRMED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
vs.	)	Case No. 99 CR 940
CASEY J. TOLAR, JR.,	)	
Defendant.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

CHARLES P. KOCORAS, District Judge:

Acting on a tip, law enforcement officers were conducting surveillance at C&I Specialized, Inc., a business located at 15212 Dixie Highway, Harvey, Illinois, in the early morning hours of November 11, 1999. The tip was to the effect that there were drugs located on a trailer parked in the lot of the business premises.

Along about 10 A.M., Casey J. Tolar, Jr., the defendant, and one Johnny Moore, approached a tractor-trailer containing thirty 500 gallon propane tank. With the use of a fork-lift one of the propane tanks was unloaded onto the ground. The surveillance agents, after consultation with a supervisor, decided to enter the business premises. A subsequent search of the propane tanks which had been located on the trailer resulted in the seizure of approximately 475 kilograms of cocaine and 2,350 kilograms of marijuana.

The lawfulness of the search and seizure is asserted by the Government to be based on consent given by Casey

Tolar. Mr. Tolar denies having given timely or voluntary consent and claims, among other things, that the law enforcement officers used psychological coercion and threats in their conduct toward him. Mr. Tolar has moved to suppress the drugs seized and has also moved to suppress statements he allegedly made at various times subsequent to the search.

In addition to the claimed coercion and threats relied on in support of his motion to suppress the drugs, Mr. Tolar also relies on the concept that the statements were the "fruit of the poisonous tree." Mr. Tolar also claims that the circumstances in which the statements were made violated his due process rights when an attorney retained on his behalf was not afforded a more timely visit with the defendant:

At the evidentiary hearing on the motions to suppress, Mr. Tolar testified, in substance as follows:

1. An unmarked police car came onto the business property at a high rate of speed with a Mars light operating on the dashboard.

2. A plainclothes officer approached him with an automatic in his hand, pointed the gun at the defendant and ordered the defendant "to get the fuck off the forklift."

3. Other agents drove onto the premises and blocked the gate, foreclosing ingress and egress.

4. Mr. Tolar was neither asked to consent nor did he do so.

5. After Mr. Tolar was told by the officer confronting him that they had a tip that there were drugs on the trailer, he was told that the tractor/trailer was going to be searched.

6. That after the search was completed, Mr. Tolar was given a form to sign in order to authorize the search. Mr. Tolar said he signed the form because the officers had already completed the search and out of fear and concern for other members of his family.

7. Mr. Tolar testified that he had no knowledge of any drugs on the trailer, that he had no involvement with drugs, and that any written or oral statements to the contrary were fabricated by law enforcement officers.

Mr. Tolar's hearing testimony was contradicted, in whole or in part, by every other witness who testified, including his friend and business associate, Johnny L. Moore, called on the defendant's behalf. Additionally, a variety of written documents and statements signed by Mr. Tolar belie his essential testimonial contentions.

Johnny L. Moore, a twenty nine year veteran of the trucking business, is a friend and business associate of the defendant. On the morning of November 11, 1999, Moore was on the business premises to see if the defendant had a load for him, at which time the defendant asked Moore to help him straighten out a load which had shifted. Moore and Tolar were in the midst of removing a propane tank from Tolar's trailer when the police arrived.

Moore testified that three cars pulled up - two unmarked cars and one Illinois State Police car. None of the cars had lights on or had lights flashing. The police cars came onto the lot at normal speed and not at a high rate of speed. The officers identified themselves after which Moore was patted down for weapons. When none were found on him, the officer with Moore holstered his weapon. Moore was told by the officer that they had a tip that the defendant had drugs on his truck; Moore told the officer he did not have any drugs. Moore was asked if the

officer could search Moore's tractor/trailer unit. Moore testified that he consented to the search, even though he *knew he could have refused* the request. Moore also testified that the officer he dealt with treated him civilly and that he did not hear any other officer scream or holler at the defendant. Moore left the premises after his own truck was searched.

Dwayne Killian, a Police Sergeant with the Joliet Police Department, was on assignment with the Metropolitan Area Narcotics Squad on the morning of November 11, 1999. He and other law enforcement officers were on surveillance across the street from 15212 Dixie Highway, Harvey, Illinois, based on a tip that there were drugs on a trailer at that address. Killian and others observed two men unload one of the cylinders from the trailer with the use of a forklift. A decision was made in consultation with Killian's supervisor to enter the truck yard in order to determine the owner and to attempt to get consent to search. Killian and Anthony Policandriotes, a Will County Deputy Sheriff also on narcotics assignment that morning, were the first to enter the truck yard premises.

Sergeant Killian approached Johnny Moore when he first entered the lot and engaged him, while Policandriotes approached the defendant Tolar. Deputy Policandriotes testified that he approached Mr. Tolar without drawing his weapon, told Tolar of the tip about drugs and asked for permission to search his tractor/trailer. Policandriotes testified that Mr. Tolar told him that there were no drugs on his truck and that he could search the truck.

The defendant was patted down after being advised by Policandriotes that it was for both their safeties. Policandriotes told Killian of Tolar's consent to search his

truck and asked Killian to secure a consent to search form. The defendant was given the form and wrote some of the truck information in his own hand on the form, in addition to signing it. The form was also signed by Killian and Policandriotes, dated, and the time inserted of 10:30 A.M.

Policandriotes testified that the defendant gave oral consent to search and also completed a written consent to search form which was witnessed by the officers, all within minutes of the officers' entry onto the business premises. The consent to search form, Government Exhibit 1 in evidence, was not only signed by the defendant, but completed in part by him. Additionally, in preprinted language above the signature, there appears language which informs the reader of the right to refuse to consent to the search and the right to refuse to sign the form. Below that appears the statement that the signer below states that "no promises, threats, force or physical or mental coercion of any kind whatsoever have been used to cause me to consent to the search described above or to sign this form." Mr. Tolar's signature appears below those admonitions.

After the defendant's trailer was searched and a substantial quantity of drugs found, the defendant was arrested, following which he was advised of his constitutional rights. Government Exhibit 2 is a statement and waiver of rights form in which, significantly, the defendant initialed each right statement separately, after which he signed the rights form at the bottom. Killian said he went through each right with the defendant, who understood each right and then initialed and signed the form. After this was done, the defendant again denied any knowledge of the drugs found.

After his arrest, Mr. Tolar was taken to the Oak Forest Police Department for processing and detention. While there, Brian Benton, another Joliet Police

Department officer, was assigned to assist in the defendant's processing. When officer Benton initially had contact with Mr. Tolar, he testified that Mr. Tolar was asking him a number of questions involving possible charges, penalties and the like. At some later point, the defendant was brought to an interview room, was read his *Miranda* rights, was given a form in which he wrote in his name and initialed each statement of rights after acknowledging that he understood them and which included a waiver provision. By the end of that day, Mr. Tolar had executed one consent to search form and two statements of rights and waiver form. During the interview, the defendant made incriminating statements regarding his narcotics activity.

On the following day, Mr. Tolar was interviewed by an Assistant State's Attorney. The written product of that interview, Government's Exhibit 4, reflects the third waiver of rights form initialed and signed by Mr. Tolar, along with a five page handwritten statement setting forth a highly specific factual recitation of Mr. Tolar's involvement in drug activity. It is notable that each page of that statement is sighed by Mr. Tolar, and that various corrections appear in the text which were initialed by both Mr. Tolar and the prosecutor. Attached to the statement is the consent to search form executed by Mr. Tolar the day before, along with the following language on page 4:

> That is a copy of the consent form I signed which allowed the police to search my truck. I signed it voluntarily. That is my signature on the form.

At the hearing on his motions to suppress, Mr. Tolar claimed that the five page statement was a complete fabrication and that he did not supply any of the information contained therein. He testified, essentially, that

he was coerced by the police officers and that he and his family were all threatened with prosecution and incarceration. In contrast to his hearing testimony, Government Exhibit 5 recites "I have been treated well while I have been in custody. The police and State's Attorney have been nice to me . . . No one has made any threats or promises to me."

The hearing testimony supplied by Illinois State Trooper Anthony Hoop and Assistant State's Attorney Ted Logerwall support the proposition that no threats were made, that the defendant was the source of the fact specific information in the statement, that the defendant understood and waived his rights, that the defendant was free to change the handwritten statement and that he actually did so in some instances. Both those witnesses denied preparing a fabricated statement and coercing the defendant into signing it.

In weighing credibility, common sense and reason are important considerations. So is motive on the part of witnesses and their interests in the case. Mr. Tolar's hearing testimony not only is contradicted by a host of other witnesses, it is also belied by his own prior conduct and statements. Defendant claims that the conduct of the law enforcement officers were hostile and coercive, and out of fear for the consequences for his family, he decided to be submissive to their commands. Friend Johnny Moore describes a different climate. The defendant is a twelve year veteran of the trucking industry with his own tractor/trailer. Running a transportation business and driving an eighteen wheeler is not an occupation for the weak and fearful. Nor does the experience of eleven years in the Navy and later reserve duty bespeak a man who will sign anything put in front of him. Any objective analysis of Mr. Tolar's character does not support the timorous

qualities he ascribes to himself. The proposition that Mr. Tolar signed the consent to search form, three waiver forms, and a detailed five page statement of drug involvement in some sort of involuntary, coerced state is rejected. The claim that the Assistant State's Attorney fabricated the detailed five page statement signed by the defendant at the bottom of each page, with changes made by and initialed by him, is ludicrous. The Government's evidence suggests that Mr. Tolar said that he knew who supplied the tip to the police and that he wasn't going to do down alone. That theory is supported by the evidence.

The evidence overwhelmingly establishes that the consent to search was knowingly and voluntarily given. It is equally clear that Mr. Tolar was given his constitutional rights on a number of occasions and that he knowingly, voluntarily and freely waived those rights. No other conclusions are reasonably possible.

In his various motions to suppress, Mr. Tolar and his counsel raise other matters in support thereof. The first of them is that the entry by law enforcement personnel on to the C&I property was itself an illegal search. As the Supreme Court has declared, "what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz v. United States,* 389 U.S. 347, 351 (1967). There is simply no expectation of privacy in an exposed business parking lot. The gate to the business parking lot was open at the time of the officers' entry on to the premises, and there was no indication that permission was required to enter. Additionally, the Supreme Court has recognized that a business, by its nature, may open itself to intrusions that would not be permissible in a purely private context. *United States v. Swart*, 679 F.2d 698, 701 (7th Cir.

1982)(citing *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 353 (1977).

Law enforcement officers had information drugs were on the tractor/trailer which was situated on the C&I lot. They observed one of the tanks being removed from the trailer. Not knowing what would happen next and not wanting to risk the disappearance of objects believed to contain drugs, exigent circumstances existed sufficient to warrant entry onto the lot to further investigate the circumstances. The combination of prior information and present observation combined to supply them with a reasonable and articulable basis to investigate further and to enter the property. The defendant's lawful consent to search his truck, the trailer and attached tractor, also validated their presence on the scene. Under these circumstances, no judicially authorized search warrant was required and no attempt to secure one was necessary.

Finally, the defendant now claims a violation of his constitutional rights because an attorney retained by others to represent him was somehow prevented from seeing him before he made the incriminating statements of November 12, 1999. There is no evidence to suggest that the defendant ever declined to be interviewed or make a statement until a lawyer was present. Not even the defendant testified that legal representation was his wish, even as he acknowledged awareness that a lawyer had been retained for him by a family member. And as discussed earlier, the defendant was advised at least three times of his right to an attorney and he acknowledged and waived that right on each occasion. Federal constitutional law does not require more for the admissibility of evidence.

In sum, Mr. Tolar's confrontation with law enforcement officers on November 11, 1999 was not so coercive or oppressive as to render his consent to search a

nullity or involuntary. He had a right to refuse to consent, a right the evidence establishes he was aware of at the time he gave it. His written acknowledgment and waiver are simply not refuted by his hearing testimony, so lacking in its credibility. Nor were any statements he made on November 11 and 12, 1999 obtained in violation of his constitutional rights. All other arguments and contentions raised in his papers have been considered and rejected. For these reasons, his motions to suppress evidence and statements and to quash his arrest are denied.

It is so ordered.

Charles P. Kocoras
United States District Judge

Dated: September 5, 2000